91-850

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

STEPHEN K. ENGLAND, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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December 1991

QUESTION PRESENTED

Whether the petitioner was denied his Fifth Amendment right against self-incrimination when, prior to charges being filed against him, the petitioner was forced to answer questions pursuant to a grant of immunity, and subsequently the Government attorney who took the immunized statement from the petitioner assisted in the preparation of the case against him.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Stephen K. England, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 3, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 33 M.J. 37 (C.M.A. 1991) (Appendix B). The United States Air Force Court of Military Review issued a decision on May 25, 1990, reported at 30 M.J. 1030 (A.F.C.M.R. 1990) (Appendix A).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 3, 1991. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a (Supp. 1989) and 28 U.S.C. § 1259(3) (Supp. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . .

Article 112a, UCMJ, 10 U.S.C. § 912a (1988), provides in pertinent part:

> (a) Any person subject to this chaper who wrongfully uses, . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substances referred to in subsection (a) are the following:
>
> (1) . . . cocaine, . . .

STATEMENT OF THE CASE

On June 2, 1989 an airman in the appellant's military unit died of a drug overdose. Subsequent urinalysis testing of the members of appellant's unit resulted in a positive urinalysis for cocaine on Airman Brister.

On June 30, 1989 Airman Brister provided a confession to Special Agent Collier of the Air Force Office of Special Investigations (OSI) also implicating the appellant, Airman Maish, and others. Hours after Airman Brister's interview, the appellant submitted to an OSI interview admitting to two uses of cocaine, *neither* of which was supported by the earlier confession of Airman Brister. Thus, *contra* the holding of both courts below, the Government did *not* have all the facts necessary to convict the appellant in place prior to the appellant's immunized statement.

On September 18, 1989 the appellant was granted testimonial immunity to submit to questioning regarding Airman Maish's use of cocaine. On September 26, 1989

Captain Tomanelli and Captain Sakellis conducted an interview of the appellant pursuant to that grant of immunity.

On October 17, 1989 Captain Tomanelli revealed the essence of the immunized testimony to Major Reusch, who subsequently preferred charges against the appellant. Captain Tomanelli administered the oath for the preferral. On the same date, Captain Tomanelli served as the Government's representative at the hearing held pursuant to Article 32, UCMJ, 10 U.S.C. § 832 (1988), to determine if sufficient grounds existed to bring the appellant to trial by court-martial. Thereafter, Captain Tomanelli acted in the role of prosecutor.

In late October/early November Lieutenant Colonel Tomes, the Ninth Air Force Staff Judge Advocate (legal advisor to the general court-martial convening authority), directed Captain Tomanelli to cease acting in the role of prosecutor in the instant case. While removing himself in name, Captain Tomanelli continued to participate in the case in an advisory capacity up to the very day of trial.

On November 21, 1989 the appellant was brought to trial. At trial, the appellant moved to dismiss "on the grounds that . . . [his] trial ha[d] been fatally tainted by the participation of government counsel after the accused's immunized statements were taken." After the military judge denied the motion, the appellant entered conditional pleas of guilty, preserving his right to appeal the military judge's adverse decision on this issue.

REASONS FOR GRANTING THE WRIT

The writ should be granted to resolve the divisive split in the courts on the issue of whether the Fifth Amendment precludes the use of nonevidentiary fruits of an interrogation compelled under a grant of immunity. The split is

acknowledged in the fairly recent First Circuit case of *United States v. Serrano,* 870 F.2d 1, 16 (1st Cir. 1989):

> To what extent the Fifth Amendment's privilege against self-incrimination bars the nonevidentiary use of immunized testimony is a difficult question. Neither *Murphy* [*v. Waterfront Comm. of New York Harbor,* 378 U.S. 52 (1964)] nor *Kastigar* [*v. United States,* 406 U.S. 441 (1972)] addressed this question, and lower courts have disagreed on the issue. Compare *United States v. Semkiw,* 712 F.2d 891 (3d Cir. 1983); [*United States v.*] *McDaniel,* 482 F.2d 305 [(8th Cir. 1973)]; *United States v. Carpenter,* 611 F. Supp. 768 (N.D. Ga. 1985); *United States v. Smith,* 580 F. Supp. 1418 (D.N.J. 1984) (all requiring government to show no nonevidentiary use of immunized testimony) with *United States v. Mariani,* 851 F.2d 595 (2d Cir. 1988); *United States v. Crowson,* 828 F.2d 1427 (9th Cir. 1987), *cert. denied,* 109 S. Ct. 87 (1988); *United States v. Byrd,* 765 F.2d 1524 (11th Cir. 1985) (all rejecting claim that nonevidentiary use warranted dismissal of indictment). The commentators are also divided over this issue. *Compare* Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment,* 66 Tex. L. Rev. 351 (1987) (arguing that Fifth Amendment prohibits only evidentiary uses of immunized testimony) with Strachan, *Self-Incrimination, Immunity, and Watergate,* 56 Tex. L. Rev. 791 (1978) (discussing dangers of nonevidentiary use of immunized testimony and arguing for transactional immunity to avoid these dangers).

The Air Force Court of Military Review and the United States Court of Military Appeals decided a question of law which has not yet been, but should be, settled by this

Court, namely, whether immunity protections extend only to evidentiary uses of an individual's immunized statements or to nonevidentiary uses as well.

Nonevidentiary uses have been described as "conceivably includ[ing] assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973). The Air Force Court of Military Review conceded that Captain Tomanelli continued to advise the prosecutors and actively participate in the case *after* he took the immunized testimony from the appellant. *United States v. England,* 30 M.J. 1030, 1031-32 (A.F.C.M.R. 1990). Captain Tomanelli also admitted to helping plan trial strategy, and the record makes clear that the case was not preferred until well after the immunized testimony was obtained. The court, nevertheless, upheld the trial court's decision on the basis that no *evidentiary* uses were made of such knowledge. Whether a motion to dismiss can be supported by nonevidentiary uses of immunized testimony is an issue which this Court has not addressed directly, and which the lower courts are deeply divided over.

Arguably, the opinions below contravene earlier directions of this Court, since in *Kastigar, supra,* "the Court emphasized that use and derivative use immunity prohibited prosecutorial authorities from using compelled testimony 'in *any* respect'; and that the statute provided 'a sweeping proscription of *any* use'; and a '*total* prohibition of use.' " Strachan, *Self-Incrimination, Immunity, and Watergate,* 56 Tex. L. Rev. 791, 807 (1978) (emphasis in original, footnotes omitted). "*Kastigar* does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony," it prohibits "any use, direct

or indirect." *United States v. North,* 910 F.2d 843, 861 [*North I*], *modified,* 920 F.2d 940 (D.C. Cir. 1990) [*North II*]. *Accord United States v. Poindexter,* No. 90-3125, 1991 U.S. App. LEXIS 26824 (D.C. Cir. Nov. 15, 1991).

Both the Air Force Court and the Court of Military Appeals relied heavily on *United States v. Gardner,* 22 M.J. 28 (C.M.A. 1986), a case which is distinguishable from the instant case in many significant respects. In *Gardner,* the Court of Military Appeals set out standards to minimize the possibility of nonevidentiary uses of immunized testimony by the prosecution, nevertheless the Air Force Court used *Gardner* to justify the multitude of nonevidentiary uses of the appellant's immunized testimony by the prosecution.

The Air Force Court of Military Review decided the instant case in a way which appears to conflict with the Army Court of Military Review's decision in *United States v. Eastman,* 2 M.J. 417 (A.C.M.R. 1975). In fact, the Air Force Court quite clearly questioned the validity of *Eastman. United States v. England,* 30 M.J. 1030, 1032 (A.F.C.M.R. 1990).

In *United States v. Eastman,* 2 M.J. 417, 419 (A.C.M.R. 1975), one of the first military cases to apply *Kastigar,* the Army Court of Military Review stated that "Federal case law and law review commentators generally agree that certain minimum guidelines must be followed" in trials occurring after the obtaining of immunized testimony from the accused. The court set out such guidelines for use in military courts-martial as follows:

> a. No use, direct or derivative, can be made of the immune testimony. . . . Prosecutorial use of testimony could include *assistance in focusing the investigation, deciding to initiate prosecution, refusing*

> *to plea bargain; interpreting evidence, planning cross-examination, and planning trial strategy.*
>
> b. The Government should be confined to evidence which was certified by the court before the testimony was compelled. . . .
>
> c. To assure non-use, no one involved in the prosecution of an accused may read his immune testimony. As we have already indicated, we believe this would include *all personnel involved in pretrial activities* such as the Article 32 investigating officer, *all personnel involved in pretrial advice to the convening authority* and the convening authority himself. . . .

Id., at 419 (emphasis added, citations omitted). In the case at bar there is conspicuous and prejudicial straying from these guidelines.

As to the first guideline, the prosecution failed to bear its "heavy burden of affirmatively proving that no evidence was derived, directly or indirectly from the testimony compelled from the appellant under the grant of immunity." *Id.*, at 418 *citing United States v. Rivera*, 23 U.S.C.M.A. 430, 50 C.M.R. 389, 1 M.J. 107 (1975). In fact, Captain Tomanelli admitted that *after* he interviewed the appellant under the grant of immunity, he attempted to set up an interview with Airman Parker, to determine his usefulness as a witness in appellant's case. R. 22. Airman Parker was another member of the appellant's unit who was alleged to have been involved in illicit drug use. Captain Tomanelli also admitted that just a week before trial (well after the immunized interview) he discussed with Captain Nesser, one of the trial counsel in appellant's case, how to try to admit statements made by the appellant, under Mil. R. Evid. 404(b) (identical to Fed. R. Evid. 404(b)). R. 23. He also admits discussing the production

of witnesses, trial tactics and trial strategy. R. 22. All of these actions directly violate the first guideline set out in *Eastman, supra.*

Furthermore, it is uncontested that the appellant was not charged until some 21 days *after* he provided his immunized testimony. Nevertheless, Captain Tomanelli, the very individual who questioned the appellant under the grant of immunity then served as the Government representative at the hearing under Article 32, UCMJ, 10 U.S.C. § 832 (1988). This is a direct violation of *Eastman.*

Captain Tomanelli later claimed that all of these interactions with the appellant's case did not make improper derivative use of appellant's immunized testimony. Such disclaimers are insufficient.

> What is required to permit a prosecution to go forward after a showing the accused has been granted testimonial immunity is something more than mere representations on the part of the Government, no matter that they were uttered in good faith and with the utmost integrity of belief.

United States v. Boyd, 27 M.J. 82, 85 (C.M.A. 1988) *citing United States v. Rivera, supra,* at 110.

As to the second guideline set out in *Eastman, supra,* there was no attempt whatsoever to set aside evidence prior to receipt of the compelled testimony. The court acknowledged that court certification of such evidence would be precluded under the peculiarities of military courts, but indicated something comparable should be accomplished. Several courts have suggested a means:

> We reiterate the suggestion that the Government should consider taking the precaution of "cataloguing" or "freezing" the evidence it has compiled against an individual prior to taking immunized testimony to

> assist in meeting the heavy burden of proving a legitimate, independent source of its evidence at any subsequent court-martial.

United States v. Boyd, supra at 85, *citing United States v. Gardner,* 22 M.J. 28, 32 (C.M.A. 1986). In the instant case, despite a claim by Captain Tomanelli that a decision to court-martial the appellant had been made on or about June 30, 1989, R. 17, no cataloguing was accomplished before the grant of immunity, almost three months later, nor before the immunized interview, a week after the grant. In fact no cataloguing, freezing, or compartmentalizing of any type has ever been done in this case, yet the appellant is to believe, on the word of his prosecutors, that no derivative use was ever made of his testimony.

Finally, as to the last guideline in *Eastman,* contrary to any assurance of non-use by persons involved in the prosecution of the appellant, we have in this case the active participation of Captain Tomanelli as both one who interviewed the appellant under a grant of immunity and the government representative at the Article 32 hearing. Captain Tomanelli also provided tactical and strategic advice to the counsel who ultimately tried the case right up to the time of trial—long after he had been exposed to the immunized testimony.

Captain Sakellis, the other judge advocate involved in interviewing the appellant under the grant of immunity, also intimates that he had some discussion with the Staff Judge Advocate (SJA) concerning the interview, though he is hazy on the details. As to conclusory assurances by Captain Sakellis that he believes no substantive information from the immunized testimony was revealed, the appellant is once again left impermissibly to rely on the word of those prosecuting him. The Government failed to prove that Captian Tomanelli did not also reveal details of the

interview to the SJA. It is also unclear from the record what if anything the Convening Authority knew of the interview prior to referring the appellant's case for trial. The taint of the prosecutorial chain was addressed pointedly in *United States v. Gardner*, 18 M.J. 612, 618 n.10 (A.F.C.M.R. 1984):

> It is axiomatice that the ideal situation is to dispose of an accused's trial prior to giving immunized testimony. Should the situation dictate an accused giving immunized testimony prior to his own trial, the staff judge advocate concerned will be well advised to exercise precise compartmentalization among any of his assigned judge advocates involved with the case. Even then, the better practice will be to transfer the accused's case to another convening authority.

The appellant's case was *not* transferred to another convening authority despite the fact that the same convening authority who granted the appellant testimonial immunity on September 18, 1989, subsequently referred the appellant's case to a general court-martial on November 9, 1989. The Government failed to show that the Convening Authority was not made privy to the immunized testimony of the appellant.

Government counsel alleged in their response to the Motion to Dismiss that their evidence had an independent, legitimate source since they intended only to elicit the testimony of Airman Brister and Special Agent Collier. App. Ex. III, at 2. But the signed sworn statement provided on June 30, 1989 by Airman Brister was quite vague and ambiguous, even by Captain Tomanelli's own admission. R. 24-25. It included no specific dates. The few items it was specific about directly contradicted the admissions made by the appellant in his June 30, 1989 statement. Thus, the immunized statements made by the appellant

which linked himself with Airman Brister, Airman Maish, and others implicated by Airman Brister could potentially have been used to overcome the deficiencies of Airman Brister's original statement.

Certainly it would be reasonable to assume that the Government would prepare its witnesses prior to their testifying in court. Since Captain Tomanelli continued to advise the trial counsel on tactical, strategic and witness issues, R. 22-23, even after he conducted the immunized interview, it is impossible to ascertain to what extent the witnesses may have been tainted after having been perpared by counsel who were exposed to the immunized testimony. As such, the Government failed to meet its heavy burden of affirmatively proving that derivative use of the immunized testimony would not creep in.

The same can be said with regard to Special Agent Collier. While denying that he was made privy to the substance of the immunized testimony, he intimates that he did discuss the appellant's case with Captain Tomanelli after the date of the immunized interview. R. 33-34. It was not affirmatively proven by the Government that such discussions did not amount to a tainting of Special Agent Collier. Captain Tomanelli's knowledge may have prompted him, even subconsciously, to focus on certain issues, similarities of testimony, contradictions of testimony, acquaintances of the appellant, dates, places, or other new facts learned in the immunized statement, R. 23-25, in his discussions with Special Agent Collier which could taint Special Agent Collier's testimony. Special Agent Collier would easily have been able to assimilate seemingly insignificant details since he had conducted the interviews of both Airman Brister and the appellant before the immunity grant and so knew the extent to which their separate accounts diverged and where bridges had to be built to use one against the other.

Thus, even as to these two witnesses the Government did not meet its heavy burden of showing their testimony was independent since there was apparently interaction between Captain Tomanelli and Special Agent Collier after the immunized testimony. Additionally, Captain Tomanelli's decision to continue to advise trial counsel on matters of witnesses, tactics and strategy effectively tainted both trial counsel and any witnesses they subsequently interviewed or prepared for testimony.

It must be emphasized that the burden of proof was not on the appellant to establish actual tainting, nor was it even sufficient for the Government to negate any taint. *Kastigar v. United States,* 406 U.S. 441, 460 (1972). Rather, the Government had to meet the heavy burden of proving the independence of each source and every item of evidence. *United States v. Hampton,* 775 F.2d 1479, 1489 (11th Cir. 1985). Because of Captain Tomanelli's extensive role, first as the prosecutor and then as advisor to the prosecution team, right up to the day of trial, the Government failed to meet this heavy burden.

CONCLUSION

The petitioner's case is a worthy case for this Court's review. Specifically, this case affords an opportunity for this Court to settle the question, left open by *Murphy* and *Kastigar,* both *supra,* as to whether the Government can compel an individual to indirectly incriminate himself, by offering him immunity and then making nonevidentiary uses of the information gained therein.

Respectfully submitted,

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December 1991

APPENDICES

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28276

UNITED STATES

v.

AIRMAN STEPHEN K. ENGLAND, FR 022-66-3555
UNITED STATES AIR FORCE

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25 MAY 1990

Sentence adjudged 21 November 1989 by GCM convened at Homestead Air Force Base, Florida. Military Judge: Jay L. Davis (sitting alone).

Approved sentence: Bad conduct discharge, confinement for eight (8) months, forfeiture of four hundred sixty dollars ($460.00) pay per month for eight (8) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Richard W. Aldrich. Appellate Counsel for the United States: Colonel Robert E. Giovagnoni; Major Paul H. Blackwell, Jr. and Captain James C. Sinwell.

Before BLOMMERS, KASTL and MURDOCK, Appellate Military Judges

DECISION

KASTL, Senior Judge:

May a military member be tried by court-martial despite the fact that the Government possesses his immunized testimony? Yes—*provided the Government shoulders its heavy burden and proves that its evidence at trial arose completely independent of that immunized testimony. See Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

Applying *Kastigar* and its lineage, we conclude that the military judge did not err in refusing to grant the appellant's motion to dismiss because of such alleged taint.

Factual Setting

Airman England faced a bench trial general court-martial for using cocaine on divers occasions, in violation of Article 112a, UCMJ. His conditional pleas of guilty preserve before us his contention that the Government used tainted evidence against him. He was found guilty and sentenced to a bad conduct discharge, confinement for eight months, forfeiture of $460.00 pay per month for eight months, and reduction to airman basic.

In early June 1989, an airman in England's unit died after a drug overdose. This triggered subsequent urinalysis tests. Airman Brister "popped positive" for cocaine use. On 30 June, Brister confessed his use to the Office of Special Investigations (OSI). He also implicated others, including the appellant and an Airman Maish. Hours after the Brister interview, the appellant conceded to the OSI that he had twice used cocaine.

In September 1989, the appellant received testimonial immunity as to Maish's drug use. Captains T and S interviewed him in the Maish investigation under that grant of

immunity. In October 1989, the same Captain T served as Government representative at the appellant's Article 32 investigation.

Soon thereafter, personnel at the Office of the Staff Judge Advocate, Ninth Air Force (legal advisor to the general court-martial convening authority), removed Captain T as trial counsel in the appellant's court-martial. He continued to advise the new trial team, however.

Improper Use of Immunized Testimony?

Before us, the appellant argues that:

> THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY FAILING TO GRANT THE MOTION TO DISMISS BASED ON THE GOVERNMENT'S IMPROPER USE OF IMMUNIZED TESTIMONY.

The military judge made extensive findings. He ruled that the Government had sustained its heavy burden and had affirmatively demonstrated that all of its evidence at trial originated independent of the compelled testimony. The case against the appellant was complete on 30 June 1989. It consisted of two items: (1) appellant's confession to the OSI; and (2) Brister's statement. Nothing learned during the course of England's subsequent immunized interview about Maish was useful in convicting either Maish or the appellant.

We agree with the military judge's findings. We are satisfied that the Government met its affirmative burden to show that its evidence arose from a source completely independent of England's compelled testimony. *See United States v. Gardner*, 22 M.J. 28, 30-31 (C.M.A. 1986), citing *Kastigar v. United States*, 406 U.S. 441, 446,

92 S.Ct. 1653, 1657, 32 L.Ed.2d 212 (1972); *see also United States v. Garrett*, 24 M.J. 413, 416 (C.M.A. 1987); Healy, *Problems in Immunity for Military Witnesses*, Army Lawyer (Sept. 1986) 21, 27-29.

We are confident the appellant's immunized testimony was never used to improve or perfect the Government's case. On 30 June the following two evidentiary matters were comfortably in Government hands:

1. Brister implicated the appellant; and
2. The appellant confessed.

Suppose that on that date—and until his trial—the appellant maintained silence, despite Government attempts to loosen his tongue with a grant of immunity. One cannot evade the logic of the situation—*all the facts necessary to convict the appellant were in place on 30 June.* There was no Government corporate thumb impermissibly tilting the scales of justice. To the contrary, the Government had ample evidence, independent of any compelled testimony, to convict the appellant.

The appellant relies on *United States v. Eastman*, 2 M.J. 417 (A.C.M.R. 1975), as a key to overturning his conviction. He argues that *Eastman* mandated certain rules for prosecutors. In contrast to that mandate, he insists, the Government blundered badly. It neither quarantined the compelled testimony from England's court-martial nor sealed that testimony away from its prosecutorial arm.

We are not entirely comfortable with *Eastman*, an early effort to apply *Kastigar* in a military setting. Its strictures for erecting a "Chinese wall" for Army staff judge advocates, prosecutors, Article 32 officers, and other legal personnel, while perhaps advisable, may go beyond what it absolutely necessary. *Eastman* has only been cited in one

other opinion, to the best of our knowledge. That was a passing reference in *United States v. Tucker*, 20 M.J. 601 (N.M.C.M.R. 1985). Our Navy-Marine Corps brethren there compared *Eastman*, without comment, to this Court's decision in *United States v. Gardner*, 18 M.J. 612 (A.F.C.M.R. 1984), *aff'd.* at 22 M.J. 28 (C.M.A. 1986).

Whatever the validity of *Eastman*, we consider the guidance of the Court of Military Appeals in *Gardner* binding. There, the Court found no fatal blemish by participation of a member of the prosecution in obtaining the appellant's immunized testimony. We also believe *Gardner* echoes recent Federal civilian court analysis. *See, e.g., United States v. Serrano*, 870 F.2d 15, 17 (1st Cir. 1989); *United States v. Gallo*, 863 F.2d 185, 190 (2d Cir. 1988); *United States v. Friedrick*, 842 F.2d 382, 394-395 (D.C. Cir. 1988).

A Caveat for Practitioners

From our vantage point, we can occasionally serve the field by cautioning those responsible for military justice as to some of the bogeymen lurking.* This is such a case.

We make the following observations. First, this appeal could have been minimized if the immunized data had been screened from the trial team. Second, ideally, all the data should have been catalogued or sealed so as to provide a clear, sanitized paper trail. *United States v. Boyd*, 27 M.J. 82, 85 (C.M.A. 1988) and cases cited; DA Pam 27-22 *Evidence*, para. 24-2c(4)(d) (15 July 1987). Third, Captain T should have recused himself from all contact with the new prosecutors so as to preclude any supposition

* One successful staff judge advocate keeps a folder entitled "Let's Not Do *THAT* Again," which is required reading for all newcomers. We consider it a wise practice to minimize errors.

that the trial may have been flawed by the use of immunized testimony.

The findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge MURDOCK concurs.

Senior Judge BLOMMERS absent.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman

MARY V. FILLMAN
Captain, USAF
Chief Commissioner

U.S. COURT OF MILITARY APPEALS

No. 64,962
ACM 28276

UNITED STATES, APPELLEE

v.

STEPHEN K. ENGLAND, AIRMAN, U.S. AIR FORCE,
APPELLANT

Argued Feb. 23, 1991
Decided Sept. 3, 1991

For the Appellant: *Captain Richard W. Aldrich* (argued); *Lieutenant Colonel Jeffrey R. Owens* (on brief); *Colonel Richard F. O'Hair.*

For Appellee: *Captain James C. Sinwell* (argued); Lieutenant Colonel Brenda J. Hollis (on brief); Major Paul H. Blackwell, Jr.

Opinion of the Court

COX, Judge:

Appellant was convicted by general court-martial (military judge alone), following conditional guilty pleas, of one specification of wrongful use of cocaine on divers occasions, in violation of Article 112a, Uniform Code of

Military Justice, 10 U.S.C. § 912a. He was sentenced to a bad-conduct discharge, 8 months' confinement, forfeiture of $460.00 pay per month for 8 months, and reduction to airman basic (E-1). The convening authority approved the sentence, and the Court of Military Review affirmed the findings and sentence. 30 MJ 1030 (1990).

We granted review to consider:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY FAILING TO GRANT THE MOTION TO DISMISS BASED ON THE GOVERNMENT'S IMPROPER USE OF IMMUNIZED TESTIMONY.

Following the drug-overdose death of an airman, five members living in the same dormitory with the deceased were tested for substance abuse. One member, Airman Brister, tested positive for cocaine use. Brister confessed to investigators from the Office of Special Investigations (OSI) and implicated appellant, Airman Maish, and one other airman. Brister said appellant used cocaine on four separate occasions. Appellant was later interviewed by OSI investigators and admitted to cocaine use.

Appellant was interviewed several months later, pursuant to a grant of testimonial immunity, by Captain Steven N. Tomanelli, a judge advocate assigned to prosecute Airman Maish. It is this interview which gives rise to the issue on appeal. The purpose of the interview was to determine if appellant could provide corroborative evidence of drug use by Airman Maish. Appellant denied any knowledge.

The next month charges were preferred against appellant. Captain Tomanelli represented the Government at

the pretrial investigation convened to consider whether appellant should be tried for the drug offenses. Art. 32, UCMJ, 10 U.S.C. § 832. Therefore, at the suggestion of higher headquarters, Captain Tomanelli removed himself as trial counsel and did not participate further in the prosecution.

At trial, appellant moved to dismiss the case against him "on the grounds that . . . [his] trial ha[d] been fatally tainted by the participation of government counsel after the accused's immunized statements were taken." Considerable testimony was heard on the motion before the military judge denied it.

Appellant also moved to suppress his confession due to lack of corroboration. Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984. The military judge granted the motion in part, admitting only those portions of the confession that involved appellant, Airman Brister, and two other airman. Following the military judge's rulings, appellant entered pleas of guilty conditioned upon preserving his right to appeal these decisions. *See* RCM 901(a)(2), Manual, *supra*.

On review, the Court of Military Review asked the following rhetorical question:

> May a military member be tried by court-martial despite the fact that the Government possesses his immunized testimony? Yes—*provided the Government shoulders its heavy burden and proves that its evidence at trial arose completely independent of that immunized testimony. See Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

30 MJ at 1031.

The Court of Military Review then examined the record and concluded:

> We are confident the appellant's immunized testimony was never used to improve or perfect the

> Government's case. On 30 June the following two evidentiary matters were comfortably in Government hands:
>
> 1. Brister implicated the appellant; and
> 2. The appellant confessed.
>
> Suppose that on that date—and until his trial—the appellant maintained silence despite Government attempts to loosen his tongue with a grant of immunity. One cannot evade the logic of the situation—*all the facts necessary to convict the appellant were in place on 30 June.* There was no Government corporate thumb impermissibly tilting the scales of justice. To the contrary, the Government had sample evidence, independent of any compelled testimony, to convict the appellant.

Id. at 1032.

In *United States v. Gardner,* 22 MJ 28, 31 (CMA 1986), we suggested several factors to be considered in deciding whether the Government's evidence against appellant was obtained from a source wholly independent of appellant's immunized testimony, as follows:

1. Did the accused's immunized statement reveal anything "which was not already known to the Government by virtue of [the accused's] own pretrial statement"?

2. Was the investigation against the accused completed prior to the immunized statement?

3. Had "the decision to prosecute" accused been made prior to the immunized statement? and,

4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?

Appellant argues correctly that, once the Government elects to immunize a member in order to obtain evidence,

immunity extends not only to use of the information obtained but also to derivative use. *United States v. Boyd,* 27 MJ 82 (CMA 1988); *see also United States v. North,* 910 F.2d 843, 860-63 (D.C.Cir. 1990), *cert denied,* —U.S.—, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991). In order to protect an accused against derivative use of his coerced testimony, appellant urges us to adopt rigid guidelines which the Government must follow prior to prosecuting an accused who has been forced, by immunity, to give evidence to the Government. *See United States v. Eastman,* 2 MJ 417 (ACMR 1975). For example, *citing Eastman, Boyd,* and *Gardner,* appellant argues that the Government should be required to "compartmentalize" in advance of the immunity all the evidence it has against an accused, file it with a court, and then rely solely on that evidence to prosecute the accused. However, although the Government can most certainly make its case easier to prove by "cataloguing" or "freezing" its evidence, such is not required. *United States v. Gardner,* 22 MJ at 32.

What is required is that the Government prove by a preponderance of the evidence that it did not use the immunized testimony against an accused, either directly or indirectly. *Kastigar v. United States, supra.*

The most difficult question to resolve is the participation by Captain Tomanelli in both the immunized interview and the subsequent Article 32 investigation of appellant. It also is clear from his testimony at trial that the decision to prosecute appellant had not yet been made at the time of the immunized interview. However, here the immunized interview was focused only on the prosecution of another member, Airman Maish. It is significant that the military judge made a specific finding of fact supported by the evidence of record that nothing was learned in the interview which might incriminate appellant or otherwise be used to his disadvantage. Indeed, it appears

that the interview was a "non-event." Not only was nothing learned about appellant's case; nothing was learned about Maish's case either. Nothing happened as a consequence of the interview. Likewise, there is nothing in the record which suggests that the decision to prosecute appellant was made as a result of the immunized interview.

Most certainly the better practice would have been for Captain Tomanelli to have divorced himself completely from appellant's case, even to the extent of forwarding the case to a different convening authority (or at least to the Circuit Trial Counsel in Air Force practice). We are satisfied, however, that appellant was not prejudiced by either the interview or Captain Tomanelli's participation in the Article 32 investigation. Art 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Gardner, supra.*

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Senior Judge EVERETT concur.

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(2)

No. 91-850

In the Supreme Court of the United States

OCTOBER TERM, 1991

STEPHEN K. ENGLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government used against petitioner information acquired from him under a grant of use immunity.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 7a-12a, is reported at 33 M.J. 37. The opinion of the Air Force Court of Military Review, Pet. App. 1a-6a, is reported at 30 M.J. 1030. The findings of fact by the trial court, App., *infra*, 1a-3a, are unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 3, 1991. The petition for a writ of certiorari was filed on December 2, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following his entry of a conditional guilty plea, petitioner was convicted of one specification of the wrongful use of cocaine on diverse occasions, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. He was sentenced to eight months' confinement, a bad conduct discharge, forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The court of military review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. Early in June 1989, an airman in petitioner's dormitory died of a drug overdose. Thereafter, five servicemembers living in that dormitory were given urinalysis tests for drug use. One, Airman Donald Brister, tested positive. On June 30, Special Agent Gary Collier of the Air Force Office of Special Investigations (OSI) questioned Brister about his possible involvement in illegal drug activities. Tr. 30. Airman Brister gave the agent a written statement in which he admitted using cocaine and in which he implicated petitioner and two other servicemembers, including Airman James Maish, in the use of cocaine on four separate occasions. AX 4. Agent Collier also interviewed petitioner that day. During the interview petitioner admitted having used cocaine on two occasions. Tr. 31; AX 3. See Pet. App. 2a, 8a.

Nearly three months later, on September 26, Captains Nick Sakellis and Steven Tomanelli interviewed petitioner pursuant to a grant of use immunity dated September 18, 1989. Tr. 15; AX 2. The Air Force

granted petitioner use immunity in order to be able to ask him whether he knew about any drug use by Airman Maish. Tr. 13, 14. Captain Tomanelli asked petitioner only about possible drug usage by Airman Maish. Tr. 14. Petitioner denied having any such knowledge. Captain Tomanelli did not ask petitioner about petitioner's own drug use. *Ibid.*[1]

One month later, on October 18, Captain Tomanelli acted as counsel for the government in a hearing for petitioner held pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 832, to determine whether the case against petitioner should proceed forward to a court-martial.[2] Late that month

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[1] During the hearing on petitioner's motion to dismiss, Captain Tomanelli described his questioning of petitioner as follows, Tr. 13-14:

> The total interview took about twenty minutes. About half of that time was spent with my co-counsel, Captain Sakellis, discussing the air traffic controller field with [petitioner], since Captain Sakellis was a prior enlisted person in that career field. But the actual substance of the interview was actually about ten minutes.
>
> My framework for the interview was to ask [petitioner] did he see Maish use on any of the occasions that Brister indicated that Maish had used. None of the questions I asked [petitioner] concerned his own use or his own involvement in drugs or anything else that could be used against him in any subsequent trial of his own.
>
> * * * * *
>
> There really was no information of value gained from that interview. Essentially he denied ever seeing Maish use any kind of controlled substance. Since I was prosecuting Maish those were the only questions I asked. I never asked [petitioner] about his own involvement in drug use.

[2] An Article 32 hearing in the military is similar to a preliminary hearing in the civilian criminal justice system.

or early in November, at the suggestion of Air Force headquarters, Captain Tomanelli removed himself as the prosecutor in petitioner's case, since he had interviewed petitioner under a grant of use immunity. The captain, however, continued to advise his replacement about the admissibility of Brister's and petitioner's statements. Tr. 18-19.

2. Petitioner thereafter filed a motion to dismiss the charge of wrongfully using cocaine. The gravamen of petitioner's claim was two-fold: He claimed that the government used his statements during the September 26 interview in deciding to charge him with cocaine use. Petitioner further argued that the prosecution of him was tainted in two respects: Captain Tomanelli participated in the Article 32 hearing before he was replaced as the prosecutor, and Captain Tomanelli thereafter continued to advise his replacement about the case. AX 1, at 1-2.

The trial judge held a hearing on the motion. Tr. 13-43. After the hearing, the trial judge denied petitioner's motion to dismiss the charge and made extensive findings of fact. Tr. 43-45; App., *infra*, 1a-3a.[3] The trial court made the following critical findings, *ibid.*:

> Three, the AFOSI ceased their investigation of the accused's alleged use of cocaine not later than 29 August 1989. However, the decision to court-martial the accused was made on or shortly after 30 June 1989 by officials of the Office of the Staff Judge Advocate, Homestead Air Force Base, Florida. The proposed evidence was the aforementioned statement by Airman Brister

[3] The trial judge's findings of fact are reprinted as an appendix to this brief.

and the accused's admissions to Special Agent Collier.

* * * * *

Eleven, no information obtained during the course of the immunized interview, other than the fact that no relevant information was obtained, was passed by Captain Tomanelli to the current trial team.

Twelve, the evidence the government intends to introduce to prove its case is the same evidence that was available to officials on or shortly after 30 June 1989, that is the statement of Airman Donald K. Brister, and the admissions made to Special Agent Collier by the accused on 30 June 1989.

Thirteen, the proffered evidence though not, [*sic*] "categorized and sealed", [*sic*] as suggested by our appellate courts, is nevertheless specifically identifiable as to its source and date of acquisition.

Fourteen, the proffered evidence has likewise affirmatively been shown to be from sources obtained prior to and independent from any information provided by the accused during the course of his immunized interview on 26 September 1989.

Thereafter, petitioner entered a conditional guilty plea to numerous uses of cocaine.[4]

3. The Air Force Court of Military Review affirmed. Pet. App. 1a-6a. It upheld the trial judge's

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[4] Rule for Courts-Martial 910(a)(2), *Manual for Courts-Martial, United States—1984*, permits a military defendant, with the consent of the government and the approval of the trial judge, to enter a conditional plea of guilty in order to preserve his right to obtain appellate review of adverse rulings on pretrial motions.

finding that, before petitioner was granted use immunity, the government had both Airman Brister's statement incriminating petitioner and petitioner's own confession. *Id.* at 4a. The court also found that the government did not use against petitioner anything that it learned during the September 26 interview. *Id.* at 3a.

4. The Court of Military Appeals affirmed. Pet. App. 7a-12a. It found that petitioner's September 26 interview was a "non-event" because "nothing was learned in the interview which might incriminate [petitioner] or otherwise be used to his disadvantage." *Id.* at 11a, 12a. The court also found that petitioner was not prejudiced by Captain Tomanelli's participation in the Article 32 hearing. *Id.* at 11a-12a.

ARGUMENT

Petitioner claims that the government violated his Fifth Amendment privilege against compulsory self-incrimination by using against him statements that he made during the September 26 interview. That claim does not warrant review by this Court.

1. After an evidentiary hearing, the trial court found that the government made no use of petitioner's statements to Captains Tomanelli and Sakellis during the September 26 interview. The court of military review and the Court of Military Appeals upheld that finding, and the concurrent findings of the lower military courts do not warrant review by this Court. See, *e.g.*, *Doe* v. *United States*, 465 U.S. 605, 613-614 (1984). Moreover, petitioner did not make any statement during the September 26 interview that could have been of use to the government. Captain Tomanelli asked petitioner about Airman Maish's, not petitioner's drug use, and petitioner denied having

any such information. Petitioner also points to no information that he gave Captain Tomanelli that the government could have used against him. The Court of Military Appeals was therefore correct in describing the September 26 interview as a "non-event." Pet. App. 11a-12a.

Captain Tomanelli's involvement in petitioner's Article 32 hearing consisted of minimal questioning of two witnesses, Airman Brister and Agent Collier. Airman Brister was asked one question: whether he would adopt his prior statement. Tr. 14; AX 6. Agent Collier was asked only one question: to give a narrative account of his interview of petitioner. *Ibid.* While there is some evidence that Captain Tomanelli gave advice to the new prosecution team about how to admit petitioner's confession, Tr. 22-23, in the interview petitioner merely denied having any knowledge of any drug activity by Airman Maish, so petitioner's interview clearly was not helpful to the government's efforts to have the confession admitted.

In *United States* v. *Gardner*, 22 M.J. 28 (1986), the Court of Military Appeals outlined several factors to be used in determining whether the government has met its burden to show that its evidence against an accused was obtained from a source wholly independent of the accused's immunized interview, as required by *Kastigar* v. *United States*, 406 U.S. 441 (1972).[5] In this case, each factor supports the con-

[5] The Court of Military Appeals listed the following factors in *Gardner*, 22 M.J. at 31: (1) whether a defendant's immunized statement revealed anything that was not already known by the government; (2) whether the investigation against the defendant was completed prior to the immunized statement; (3) whether the decision to prosecute the defendant was made prior to the immunized statement; and (4)

clusion that the government obtained its evidence against petitioner from independent sources. First, the government did not learn anything about petitioner's cocaine use from the September 26 interview. Second, the government had completed its investigation of petitioner on August 29, 1989, Tr. 32, three weeks before he was granted use immunity on September 18, 1989. Third, the government decided to prosecute petitioner for his drug use shortly after June 30, 1989, which was, again, well before petitioner was granted use immunity and interviewed.[6] Fourth, Captain Tomanelli removed himself from petitioner's case before petitioner entered his plea, and the captain told the prosecutor only that "no relevant information was obtained" from the September 26 interview. App., *infra*, 2a. In sum, petitioner cannot escape the fact that his prosecution was not tainted by evidence derived from the immunized interview because there was *no* evidence derived by the prosecution from the interview.

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whether the trial judge disqualified a trial counsel who had been exposed to the immunized statement.

[6] The Court of Military Appeals stated that "[i]t also is clear from [Captain Tomanelli's] testimony at trial that the decision to prosecute [petitioner] had not yet been made at the time of the immunized interview." Pet. App. 11a. That statement is wrong in two respects. First, the government had decided to prosecute petitioner before the September 26 interview. The trial judge found that "the decision to court-martial the accused was made on or shortly after 30 June 1989 by officials of the Office of the Staff Judge Advocate, Homestead Air Force Base, Florida," App., *infra*, 1a; Tr. 43-44, and the evidence supports that finding, Tr. 17-18. The Court of Military Appeals simply misread the record. Second, there was no trial held in this case. After the trial court denied petitioner's motion to dismiss the charge, petitioner entered a conditional guilty plea.

2. Petitioner asserts that there is a "divisive split in the courts on the issue of whether the Fifth Amendment precludes the use of nonevidentiary fruits of an interrogation compelled under a grant of immunity." Pet. 3. This case does not present that question, however, since the Court of Military Appeals agreed with petitioner that the government cannot make nonevidentiary uses of information acquired from someone under a grant of use immunity. As the Court of Military Appeals explained, "[petitioner] argues correctly that, once the Government elects to immunize a member in order to obtain evidence, immunity extends not only to use of the information obtained but also to derivative use." Pet. App. 10a-11a. The military courts simply found that the government had made no use of petitioner's statements. Accordingly, this case does not present the question that petitioner has asked the Court to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

APPENDIX

The trial judge made the following findings of fact, Tr. 43-45:

> Having carefully considered the testimony of the witnesses called before this court and the documentary evidence introduced as Appellate exhibits I through VI, the court finds, by clear and convincing evidence, the following:
>
> One, on 30 June 1989, as a consequence of the sworn statement given by Airman Donald K. Brister to AFOSI Special Agent Gary W. Collier the accused, Airman Stephen K. England, was first identified as a suspected user of cocaine.
>
> Two, on the same date, 30 June 1989, Special Agent Gary W. Collier, [*sic*] interviewed the accused and elicited allegedly incriminating admissions on the part of the accused relating to his past use of the drug cocaine.
>
> Three, the AFOSI ceased their investigation of the accused's alleged use of cocaine not later than 29 August 1989. However, the decision to court-martial the accused was made on or shortly after 30 June 1989 by officials of the Office of the Staff Judge Advocate, Homestead Air Force Base, Florida. The proposed evidence was the aforementioned statement by Airman Brister and the accused's admissions to Special Agent Collier.
>
> Four, the accused was granted testimonial immunity on 18 September 1989 by the general court-martial convening authority in an effort to secure additional evidence concerning the alleged

use of cocaine on the part of one Airman James A. Maish.

Five, [o]n 26 September 1989, the accused was interviewed under a grant of immunity by Captains Steven N. Tomanelli and Nicolas G. Sakellis, both assigned to the Homestead Air Force Base, Office of the Staff Judge Advocate.

Six, during the course of his immunized interview, the accused provided no information relevant to the prosecution of the case at bar nor to that of Airman James A. Maish and Captain Tomanelli made this fact known to the staff judge advocate and the trial counsel present in the court today.

Seven, on 17 October 1989, the current charge was preferred against the accused and on the same date major David F. Garber, also assigned to the Homestead legal office, was detailed as the Article 32 UCMJ Investigating Officer.

Eight, Captain Steven N. Tomanelli served as the government's representative during the course of the accused's Article 32 UCMJ investigation. Captain Tomanelli declined to interview Special Agent Collier during the investigation due to the fact that he had previously interviewed the accused under a grant of immunity. The investigating officer interviewed Special Agent Collier.

Nine, no evidence forwarded to the general court-martial convening authority via the accused's Article 32 UCMJ Investigation contained evidence of or derived from the accused's immunized interview with Captain Tomanelli on 26 September 1989.

Ten, at the suggestion of officials from Headquarters, Ninth Air Force, Captain Tomanelli was removed as the prospective trial counsel for the case at bar sometime in mid to late October 1989, but has continued in an advisory capacity to the trial team consistent with his role as Chief of Military Justice.

Eleven, no information obtained during the course of the immunized interview, other than the fact that no relevant information was obtained, was passed by Captain Tomanelli to the current trial team.

Twelve, the evidence the government intends to introduce to prove its case is the same evidence that was available to officials on or shortly after 30 June 1989, that is the statement of Airman Donald K. Brister, and the admissions made to Special Agent Collier by the accused on 30 June 1989.

Thirteen, the proffered evidence though not, [*sic*] "categorized and sealed", [*sic*] as suggested by our appellate courts, is nevertheless specifically identifiable as to its source and date of acquisition.

Fourteen, the proffered evidence has likewise affirmatively been shown to be from sources obtained prior to and independent from any information provided by the accused during the course of his immunized interview on 26 September 1989.

Accordingly, the defense Motion to Dismiss is denied.

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